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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 412

SALVATORE SHILLITANI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 442

ANDIMO PAPPADIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals in *Shillitani* (No. 412) (2 S.R. 71–76)[1] is reported at 345 F. 2d

[1] The printed record in *Shillitani* v. *United States*, No. 412, although in one volume, has two separate paginations. The first 24 pages are designated as "1 S.R.". The last 79 pages, which commence with the appendix filed by the government in the court below, are designated as "2 S.R.". References to the record in *Pappadio* v. *United States*, No. 442, are prefixed "P.R.".

290. The opinion of the court of appeals in *Pappadio* (No. 442) (P.R. 220–226) is reported at 346 F. 2d 5. The opinion of the district court in *Pappadio* (P.R. 70–78) is reported at 235 F. Supp. 887.

JURISDICTION

The judgment of the court of appeals in *Shillitani* was entered on May 18, 1965 (2 S.R. 77) and in *Pappadio* on May 24, 1965 (P.R. 227). A petition for rehearing filed by Pappadio was denied on June 21, 1965 (P.R. 228). On June 29, 1965, Mr. Justice Harlan extended the time within which to file a petition for a writ of certiorari in *Shillitani* to and including August 3, 1965 (2 S.R. 78), and on July 6, 1965, extended the time within which to file a petition for a writ of certiorari in *Pappadio* to and including August 19, 1965 (P.R. 229). The petition for a writ of certiorari in *Shillitani* was filed on July 31, 1965, and in *Pappadio* on August 10, 1965, and both petitions were granted on November 15, 1965 (2 S.R. 78–79; P.R. 230). 382 U.S. 913, 916. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a charge of contempt in refusing to answer questions before the grand jury requires a jury trial (Nos. 412 and 442) and an indictment (No. 412).

2. Whether the "admixture of civil and criminal contempt" invalidates the judgment of conviction (No. 412).

3. Whether it was constitutionally permissible for the district court to impose two-year sentences.

4. Whether the two-year sentence imposed on Pappadio was reasonable (No. 442).

RULE INVOLVED

Rule 42, Federal Rules of Criminal Procedure provides in pertinent part:

* * * * *

> (b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict of finding of guilt the court shall enter an order fixing the punishment.

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STATEMENT

Shillitani v. *United States*, No. 412

On August 10, 1964, in the Southern District of New York, in a proceeding under Rule 42(b), F.R. Crim. P., petitioner was found guilty of contempt for willfully disobeying an order to answer certain questions before the grand jury after having been granted immunity from prosecution. He was sentenced to imprisonment for two years with the proviso that if he should answer the questions prior to the discharge of the grand jury, a further order "may be made terminating the sentence" (1 S.R. 21–22).

In February, April and May 1964, petitioner had appeared before the grand jury under subpoena and had refused to answer questions on the ground that the answers would incriminate him (2 S.R. 2–4, 8, 11–13, 14–18). On July 1, 1964, government counsel applied to Judge Wyatt for an order directing petitioner to testify before the grand jury under the immunity provisions of 18 U.S.C. 1406 (1 S.R. 3–6, 2 S.R. 66–70). Judge Wyatt instructed petitioner that he was being granted "full and absolute immunity" and that a failure to answer the questions would subject him to contempt proceedings (1 S.R. 6). The court read to petitioner the questions which it ordered him to answer (1 S.R. 14–19). On July 2 and again on August 4, 1964, petitioner reappeared before the grand jury and refused to answer the questions (2 S.R. 19–26, 27–33).

On August 10, 1964, upon oral notice and upon an order to show cause, petitioner was brought before

Judge MacMahon on a charge that he was in contempt of court (2 S.R 39–42, 44, 56; 1 S.R. 1). A hearing was held before Judge MacMahon. No request for a jury trial was made. After requesting dismissal on the ground that the government had failed to prove a *prima facie* case, petitioner rested (2 S.R. 54–55).

The court found petitioner guilty of criminal contempt for his willful disobedience of the court order during his appearances before the grand jury on July 2, 1964, and on August 4, 1964 (2 S.R. 56–59). The court sentenced petitioner to imprisonment for two years "or until further order of this Court, should [petitioner] answer before the grand jury the questions * * * and should [petitioner] answer those questions before the expiration of said sentence or the discharge of said grand jury, whichever may first occur, the further order of this Court may be made terminating the sentence of imprisonment" (1 S.R. 21–22).[2] In affirming, the court of appeals construed this language to mean that petitioner had an unqualified right to be released if he obeyed the order of the district court (2 S.R. 76).

Pappadio v. *United States*, No. 442

On October 30, 1964, in the Southern District of New York, in a proceeding prosecuted on written notice, petitioner was found guilty of contempt for willfully disobeying an order to answer certain

[2] The court first said (2 S.R. 61): "I want to make it clear that the sentence of the Court is not intended so much by way of punishment as it is intended solely to secure for the grand jury answers to the questions that have been asked of you."

questions before the grand jury after having been granted immunity from prosecution. He was sentenced to imprisonment for two years with the proviso that if he should answer the questions prior to the discharge of the grand jury "the further order of this Court may be made terminating and modifying the sentence of imprisonment" (P.R. 217–218).

In February, April and May 1964, petitioner had appeared before the grand jury under subpoena and had refused, on the ground of self-incrimination, to answer numerous questions (P.R. 97–109). During one of these appearances he was told that there had been testimony before a Senate committee and statements to law-enforcement officers that a person named Thomas Lucchese was the head of a group of people engaged in a number of illegal activities, including the illicit narcotics traffic, and that it had been alleged that petitioner was a member of that particular group (P.R. 102).

On August 4, 1964, petitioner was granted immunity under the provisions of the Narcotic Control Act of 1956, 18 U.S.C. 1406, and directed to answer the questions which he had previously refused to answer (P.R. 110–117). At a subsequent appearance before the grand jury on that day and again on October 6, 1964, he again declined to answer all questions except identifying questions as to name, residence and age, predicating his refusal on the First and Fifth Amendments (P.R. 118–135).

On October 8, 1964, the grand jury asked the court again to instruct petitioner to answer the questions.

His attorney contended that petitioner should not be called as a grand jury witness so long as a 1958 indictment was pending against him which charged him with conspiracy to violate the narcotic laws[3] (P.R. 136–141). His attorney also made objections to particular questions (P.R. 150–160). The court ruled that the outstanding indictment did not justify petitioner's refusal to answer since 18 U.S.C. 1406 expressly provided that the immunity it grants, both as to prosecution and as to use of testimony, covers any criminal proceeding against a defendant in any court (P.R. 143). It also overruled the objections to the questions (P.R. 163–165) and directed the witness to answer all questions previously asked (P.R. 167).

The next day and again on October 13, petitioner appeared before the grand jury (P.R. 170–189). He answered a number of questions, frequently consulting his attorney before answering. He admitted that he knew Lucchese and denied that he knew anyone who dealt in narcotics (P.R. 175). He testified that, since he had been served with the grand jury subpoena, he had met Lucchese a few times on the street and that they had met with lawyers on a few occasions (P.R. 185–186). After consulting with counsel, petitioner refused to identify the lawyer or state who else was present at the meetings. He also declined

[3] Petitioner had been severed before the case went to trial (P.R. 140). The case against the defendants who were tried is reported in *United States* v. *Aviles*, 274 F. 2d 179 (C.A. 2), certiorari denied, 362 U.S. 974; see also the ruling on the motion for a new trial, 337 F. 2d 552, certiorari denied, 380 U.S. 906. The indictment against petitioner was recently dismissed.

to tell where the meetings took place (P.R. 186–188). The grand jury again sought an order directing petitioner to answer these questions (P.R. 190–196). Petitioner's attorney objected to the questions, contending that they interfered with the attorney-client privilege and were not relevant to the grand jury inquiry (P.R. 196–200). The judge, directing petitioner to answer, explained to him that the attorney-client privilege applied to conversations between lawyer and client, but that the prosecutor had the right to ask when and where he met the lawyer, and whether anybody else was present (P.R. 201–202, 209). Petitioner thereafter said that the meetings were in the afternoon and that they could have lasted a couple of hours, but he again declined to say where the meetings took place or who was present (P.R. 210–211).

An order was issued to show cause why petitioner should not be punished for contempt (P.R. 3–6). Petitioner, in his reply, claimed that he was not required to answer on the grounds that the questions were not relevant; that there was an outstanding indictment against him; that the answers already given might be the subject of a trial for perjury; and that answers to the questions would interfere with the attorney-client relationship (P.R. 7–32). Petitioner repeated these arguments at the hearing on the order to show cause (P.R. 33–46, 60–61). Petitioner demanded a jury trial (P.R. 34), but did not contest the fact that he had refused to answer the questions at issue (P.R. 38–41, 51, 68). The court found petitioner in contempt for refusing to answer five ques-

tions (P.R. 74–75).[4] The court sentenced petitioner to imprisonment for two years "or until further order of this Court, should [petitioner] answer before the Grand Jury the questions * * * and should [petitioner] answer those questions before the expiration of said sentence or the discharge of said Grand Jury, whichever may first occur, the further order of this Court may be made terminating and modifying the sentence of imprisonment" (P.R. 217–218).[5] The court of appeals affirmed the conviction (P.R. 220–226).

SUMMARY OF ARGUMENT

These cases again present for this Court's determination the question whether, and to what extent if at all, the Constitution requires a jury trial for charges of criminal contempt. Having surveyed the decisional law and the constitutional history in our briefs in cases recently heard by this Court—including *Harris* v. *United States,* No. 6, this Term (382 U.S. 162)—we do not believe it appropriate or necessary to repeat in full the arguments previously presented. Insofar as these cases raise again the validity of the

[4] These questions are as follows:

"Mr. Pappadio, who are the attorneys who were present at these meetings?

"Aside from the meetings which you described, which took place in the street, where else did you meet with Lucchese?

"Who else was present at these meetings besides yourself, Lucchese and the attorneys?

"All right; how many of such meetings were there?

"Where did the meetings take place?"

[5] The court of appeals, six days earlier, in affirming the conviction in *Shillitani*, had construed a similar sentence to mean that the contemnor had an unqualified right to be released if he obeyed the order of the district court (2 S.R. 76).

dictum of some of the Justices in *United States* v. *Barnett,* 376 U.S. 681, 695, n. 12, we refer the Court to our brief in *Harris,* which is particularly addressed to the historical premises on which that *dictum* rests. Since the limitation on the permissible contempt sentence which that *dictum* prescribes can be justified, as a matter of constitutional interpretation, only on historical grounds, we submit that it stands or falls on the historical evidence. For reasons stated in detail in our brief in *Harris,* we believe that history conclusively demonstrates that the *dictum*'s premises are unsound.

I

In the cases now before the Court, we address ourselves principally to questions of policy. We believe that there are sound contemporary justifications for the oft-repeated rule that criminal contempts are not "criminal prosecutions" for purposes of the constitutional right to a jury trial.

A. An ordinary "criminal prosecution" arises out of the violation of a legislative command, and our legal system has always recognized that there is a greater need to obtain certain compliance with court orders than with legislative directives. All the Justices of this Court have expressed the view that a person subject to a court order may be imprisoned so as to compel him to obey the order; the same is obviously not true of a potential violation of a statute. Although criminal contempt is, as of the time when it is imposed, retrospective in nature in that it punishes past disobedience, we do not believe that it

can be properly analyzed by isolating it from the entire proceeding of which it is a part. The threat of a criminal contempt sanction often is the only compelling force that can be practically applied to obtain obedience to a court order. Orders which regulate a course of conduct cannot usually be enforced by civil contempt, and it is only the threat of certain punishment which coerces compliance. If the implementation of that threat becomes unsure, compliance with these orders is accordingly rendered doubtful. The Constitutional draftsmen apparently recognized that the enforcement of court orders must be treated differently from the enforcement of statutes because they plainly distinguished in the first Judiciary Act between the power to punish for crimes and the power to punish for contempts.

B. Juries serve a different function in trying statutory violations than they would if they were required to try contempts. Factual and legal issues have usually been exhaustively refined before a court order issues, and the jury would not have the duty in a contempt proceeding of applying a general law to a specific factual situation. Indeed, in many contempts there are no facts to be resolved, and the jury therefore would serve no purpose whatever.

C. The harm done to a rule of law by a jury's "nullification" of a court order would be much more substantial than the harm done by the failure to implement a statute. Court orders characteristically protect adjudicated private rights, and enforcement of an individual's constitutional or legal right ought

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not to depend on the popular will reflected in a jury verdict. Moreover, respect for law is more likely to be undermined if disobedience of a particularized court order, directed to a specific defendant in a specific factual context, goes unpunished than if a generalized legislative judgment occasionally goes unenforced.

II

The facts of these cases illustrate the above principles. Both *Pappadio* and *Shillitani* involve refusals to obey orders to testify. Such orders rest upon judicial powers which are basic to the operation of our legal system. Courts must have the ability to compel the testimony of those who have no lawful reason to refuse to testify. And these cases demonstrate that civil contempt is not always a practical means of enforcing such orders. When a trial is short or a grand jury's term is about to expire, coercive imprisonment may be a totally inadequate means of forcing the witness to obey the order. In neither of these cases would a jury be able to carry out the traditional jury function of finding facts since no facts were in issue. In both these cases a criminal sanction was reasonably believed necessary, but in order to tailor the sanction to the wrong which had been committed, the sentencing judges included purge clauses authorizing the release of petitioners if they subsequently complied. Since criminal procedures were followed, petitioners were not prejudiced by this added condition.

Nor does the fact that the contumacious conduct was committed out of the presence of the court war-

rant a jury trial. Whether the contempt is committed in the court's presence determines whether notice and a hearing are required, not whether the conduct constituted a "crime" in the constitutional sense. And since no statute or rule limits permissible punishment or prescribes jury trial, there is no occasion for this Court's exercise of a supervisory power either to require jury trial or to place a fixed limit upon the permissible sentence.

III

The reasonableness of petitioner Pappadio's two-year sentence is reviewable in this Court, which must consider the willfulness of the contempt, the seriousness of the offense, and the public interest in obtaining compliance. We think the district court's judgment is supportable in light of the extensive narcotics conspiracy which was being investigated by the grand jury and the possibility that petitioner Pappadio's refusal was part of a concerted plan to hinder the investigation.

ARGUMENT

INTRODUCTION

These cases, together with *Cheff* v. *Schnackenberg,* No. 67, this Term, again present the question resolved by this Court in *United States* v. *Barnett,* 376 U.S. 681, in *Green* v. *United States,* 356 U.S. 165, and in many prior decisions reviewed in *Green—i.e.,* whether criminal contempts are "crimes" or "criminal prosecutions" within the meaning of Article III, Section 2 or the Sixth Amendment of the Constitution, so as to

entitle an alleged contemnor to a jury trial as a matter of right. In addition, the judgments in the three cases turn on the validity and reach of the *dictum* of some of the Justices in *United States* v. *Barnett*, 376 U.S. 681, 695, n. 12, that "punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." The terms of imprisonment imposed in *Pappadio* and *Shillitani* exceed the statutory maximum for petty offenses, and that in *Cheff* is the maximum authorized by the petty-offense statute, 18 U.S.C. 1(3).

We will not attempt in these briefs to repeat the arguments and the survey of prior decisions contained in our briefs in *United States* v. *Barnett*, No. 107, O.T., 1963, and in *Green* v. *United States*, No. 100, O.T., 1957. And insofar as the detailed discussion of historical sources contained in our brief and appendix in *Harris* v. *United States*, No. 6, this Term, (382 U.S. 162), is relevant here, we respectfully refer the Court to those papers, which have been served on petitioners in these cases. The issues which remain to be discussed, in our view, concern the practical contemporary justification for the holding in *Barnett* and in the more than fifty cases cited therein which "support summary disposition of contempts, without reference to any distinction based on the seriousness of the offense." 376 U.S. at 694.

We believe that the holding of *Barnett* and *Green* rests firmly not only upon the constitutional history and the consistent course of decisional law elaborated in our earlier briefs, but also upon sound policies regarding the administration of justice. In short,

it is our position that disobedience of a court order, whether or not committed in the presence of the court, may and should be appropriately punished without the intervention of a jury. The cases now before the Court present, in our view, apt illustrations of the problems of judicial administration which may arise when court orders are disobeyed. They also demonstrate why the usual mode of trying criminal offenses—*i.e.*, by indictment and upon the verdict of a jury—is unsuited to the trial of criminal contempts.

We note preliminarily that in our brief in *Harris* v. *United States*, No. 6, this Term, we discussed at length the reasons why, on the basis of the colonial materials printed in the appendix to that brief, we believe that this Court should reject the *dictum* in the Court's majority opinion in *United States* v. *Barnett*, 376 U.S. 681, 695, n. 12. As we explain in *Harris*, we find no basis for the assumption that the constitutional draftsmen believed criminal contempt to be "a species of petty offense punishable by trivial penalties" (376 U.S. at 752 (Goldberg, J., dissenting)) or for the corollary proposition that criminal contempts were tried without juries in colonial days because the permissible punishments did not exceed the limits of the petty-offense jurisdiction. Blackstone's *Commentaries*, which was the authoritative exposition of the common law for judges and attorneys at the time of the adoption of the Constitution, explicitly treated contempts separately from petty offenses. Blackstone's justification for summary proceedings in contempt cases differed substantially from the stated reasons

underlying summary proceedings for "disorderly offenses."

The colonial and early State statutes also rebut any assertion that a general limitation was imposed on the permissible punishment for criminal contempt. Certain kinds of contempt, such as breaches of courtroom decorum or failure of jurors or witnesses to respond to summonses, sometimes carried explicit statutory penalties. But we have found no limitation whatever, in any colonial act, on the power of a court to punish for disobedience of its order, and the only two statutes covering such a situation apparently authorize indefinite imprisonment. While most contempt cases in colonial times (as has been true since) concerned relatively minor infractions which were punished with lesser penalties, serious contempts subjected violators to heavy fine, substantial imprisonment or other grave punishment.

Particularly enlightening are the early statutes setting the limits of petty offense jurisdiction. If these limits are compared with punishments authorized or actually imposed for criminal contempt, it becomes clear that it was never considered by the colonists that there was any relation between a grave or flagrant contempt and the class of petty offenses traditionally triable without jury.

We believe that this consistently held view rests on an appreciation of the unique function and character of contempt proceedings, both of which render such proceedings *sui generis*. Our position is that the

procedures constitutionally prescribed for "crimes" and "criminal prosecutions" do not apply when the conduct being punished is violation of a court order. In other words, the policies which underlie the guarantees of Article III and the Sixth Amendment extend only to punishment for violation of a statute and not for disobedience of a court order. It is, of course, true that in the case of both legislative and judicial commands punishment is imposed on violators as a means of deterring other offenders and compelling obedience in the first instance. But there are critical distinctions between statutes and court orders in (1) the nature of the underlying command, (2) the refinement of the particular issues of fact and law before the duty to obey is imposed, and (3) the necessity, in the administration of a rule of law, for the certain punishment of those who disobey. The greater societal interest in obtaining obedience to court orders as compared to general statutes has always been thought to justify extraordinary coercive remedies for the former which have not been deemed permissible for the latter. These differences underlie the distinctive procedures which have traditionally been utilized in adjudicating charges of contempt. They distinguish contempt from the "crimes" and "criminal prosecutions" which the Constitutional draftsmen contemplated when they secured a defendant's right to trial by jury by expressly including the guarantee in Article III and the Sixth Amendment.